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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

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LEGAL NEWS NOTES AND FACETIÆ

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CASE AND COMMENT

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Acquiring Territory by Treaty.

The power of the United States to acquire new territory by treaty was directly attacked by a recent suit brought in the supreme court of the District of Columbia by Warren B. Wilson, of Illinois, as a taxpayer, to restrain the Secretary of the Treasury from paying out money for the purchase of property at Panama, borrowing money on the credit of the United States, issuing bonds, or making any payments for such property, or for the construction and operation of the canal and Panama railroad. A demurrer to the bill being sustained, and the bill dismissed, the decree was affirmed by the court of appeals of the District, and finally by the Supreme Court of the United States. Wilson v. Shaw, 204 U. S. ——, U. S. Adv. Sheets 1906, p. 233, 27 Sup. Ct. Rep. 233. Mr. Justice Brewer, in delivering the opinion of the court, says the magnitude of the plaintiff's demand is somewhat startling, and that for the courts to interfere at the instance of a citizen who does not disclose the amount of his interest, and stay the work of construction by stopping payment, would be an exercise of judicial power which, to say the least, would be unsafe and extraordinary. Without passing on the sufficiency of plaintiff's interest to raise the question, or the right to bring suit against the government, the court denied that there was any merit in the plaintiff's contentions, and held that it is too late in the history of the United States to question its right of acquiring territory by treaty. The contention that the United States has no power to engage in the construction of the canal because the canal zone is no part of the territory of the United States is met by the terms of the treaty. The court says: "It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this nation because of the omission of some of the technical terms used in ordinary conveyances of real estate." The claim that the boundaries of the zone are not described in the treaty is answered by saying that the description is sufficient for identification, and that the zone has been practically identified by the concurrent action of the nations interested. The fact that there may possibly be a future dispute as to the exact boundary is immaterial; and the court points out that while Alaska was ceded to us forty years ago, the boundary was not settled until two or three years past. The further objection that the government has no power to engage anywhere in the construction of a railroad or canal is answered by the former decisions of the

Supreme Court in California v. Central P. R. Co. 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, and Luxton v. North River Bridge Co. 153 U. S. 525, 529, 38 L. ed. 808, 810, 14 Sup. Ct. Rep. 891, which, the court says, would have to be overruled if a different doctrine were announced. The decision may not be deemed a very momentous one because the questions involved were so nearly settled in advance, though, if the court had decided the other way it would have caused something like a convulsion in our constitutional history.

Applicability of Rule Res Ipsa Loquitur as between Master and Servant.

There is a decided conflict of opinion among the courts as to the applicability of the rule *res ipsa loquitur* as a distinctive rule in actions against a master for the death of, or personal injuries sustained by, a servant. Some courts of very high authority seem to go to the full length of denying that the rule, as a distinctive rule, ever applies in such actions. Thus, the United States Supreme Court, in Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, while not employing the Latin phrase *res ipsa loquitur*, in effect, by the language quoted, seems to deny that the rule expressed by that phrase ever applies in such actions: "While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely, . . . a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact, for the injured employee to establish, that the employer has been guilty of negligence." The view that this language amounts to a denial that the rule *res ipsa loquitur* ever applies as between master and servant is supported by the fact that the circumstances in that case,—namely, that a locomotive fireman was injured by the turning of a step on the engine as he placed his foot upon it,—would seem to present a proper case for the application of the rule, if it ever applies as between master and servant. Upon the authority of this case, the United States circuit court of appeals, in Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593, and Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320, expressly employing the phrase *res ipsa loquitur*, have also apparently denied that the rule ever applies as between master and servant. Other Federal cases to the same effect, although they may not employ the Latin phrase, are Mexican C. R. Co. v. Townsend, 52 C. C. A. 369, 114 Fed. 739; Mountain Copper Co. v. Van Buren, 59 C. C. A. 279, 123 Fed. 61; Peirce v. Kile, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865. In view of the statement hereinafter quoted from text writers, to the effect that it is the circumstances attendant upon the accident, and not the accident itself, from which, by the operation of the rule, the inference of negligence is drawn, it is proper to point out that the word "accident," as employed in the foregoing quotation from the opinion in the Patton Case, obviously includes the physical causes of the casualty as well as its occurrence.

Upon the other hand, many state courts, while expressly or impliedly conceding that the rule has a much narrower field of operation in master and servant cases than in carrier and passenger cases, nevertheless declare that the rule may, and frequently does, under proper circumstances, apply in the former class of cases. See, for example, Chenall v. Palmer Brick Co. 117 Ga. 166, 43 S. E. 443; Graham v. Badger, 164 Mass. 42, 41 N. E. 61; Wright v. Southern R. Co. 127 N. C. 227, 37 S. E. 221; Womble v. Merchants' Grocery Co. 135 N. C. 474, 47 S. E. 493; Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

Before passing to the discussion of the respective merits of these two positions and the authority in support of either, it is desirable, in view of the high authority denying that the rule ever applies between master and servant, to examine for a moment the scope and effect of that doctrine. That inquiry involves the consideration of the distinctive function of the rule *res ipsa loquitur;* and that function may be best determined by considering the conditions which create the occasion and necessity for a

distinctive rule of this character, in order to make out a prima facie case of negligence. In Shearman & Redfield on Negligence, vol. 1, § 59, it is said: "It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." This statement with reference to the rule has been frequently approved by the courts. The New York court of appeals, in Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, demonstrates the correctness of the view there taken, that it is not the injury, but the circumstances of the injury, that justify the application of the maxim and the inference of negligence, by pointing out that, if a passenger in a car is injured by striking the seat in front of him, that of itself authorizes no inference of negligence; but, if it be shown that he was precipitated against the seat by reason of the train coming in collision with another train or in consequence of the car being derailed, the presumption of negligence arises. While this illustration shows that the presumption of negligence does not arise from the occurrence of the accident alone, it also shows that the attendant circumstances from which, in connection with the accident, the presumption does arise, may be confined to the physical cause or causes of the accident, without including any circumstances which tend of their own force to point to negligence on the part of the defendant as the responsible human cause of the particular accident in question. Indeed, the distinctive and peculiar function of the rule *res ipsa loquitur* seems to be to create a presumption, or, rather, to permit an inference, of negligence,—not, indeed, from the bare fact of the accident and injury, but from that fact in connection with the physical cause or causes of the accident, without the aid of any circumstances tending of themselves to show that the responsible human cause of the particular accident in question was a fault of omission or commission on the part of the defendant. In other words, while the *res*, for the purposes of the rule as a distinctive rule of evidence, includes the attendant circumstances as well as the accident itself, the attendant circumstances included are only those which indicate the physical cause or causes of the accident, and not those which in and of themselves have some tendency to indicate the responsible human agency. The courts, however, frequently disregard this distinction, and apparently assume that the *res*, for the purposes of this rule, comprehends all the attendant circumstances of the accident, including not only those which point to the physical cause, but also those which of themselves have some tendency to show negligence. If such scope be given to the *res*, the rule fails to perform its distinctive and peculiar function, and becomes simply a specific application of the general principle, applicable to all questions of fact, that a fact in issue may be established prima facie by circumstantial evidence without any direct evidence. No special or peculiar rule is needed to establish the proposition that negligence on the part of the master may be established prima facie by circumstances tending of their own force to indicate a fault of omission or commission, even though there is no direct evidence on the point. When, however, there is nothing in the case but the accident and its physical cause or causes,—assuming that the mere existence of those causes irrespective of any antecedent omission or commission does not present a question of negligence for the jury,—it is apparent that the general principle with reference to circumstantial evidence is not sufficient, and that it is necessary to invoke a special and distinctive rule, in order to make out a prima facie case of negligence, since the fact of the accident itself, in connection with its physical cause,—excluding cases where the very existence of the cause presents a question of negligence for the jury,—rarely, if ever, has any tendency to indicate negligence as the responsible human cause of the accident in question. That is, the physical cause of the accident alone has no tendency to establish an antecedent fault of omission or commission on the part of the defendant, without which the latter, as a matter of substantive law, cannot be held responsible. It is only by the aid of the postulate—which is based upon common experience, and not upon any facts or circumstances in the case—that ac-

cidents of the kind in question do not ordinarily occur in the absence of negligence on the part of defendant, that the physical cause of the accident has any tendency to indicate negligence in this sense. Apart from that postulate, there would be no more reason for inferring the presence than the absence of negligence on the defendant's part, from the mere cause of the accident, assuming, again, that that cause is not one the very existence of which, irrespective of any antecedent fact, may be found to constitute negligence. The distinction sought to be explained between the different kinds of circumstances that may appear in connection with an accident is well illustrated by the case, supposed in the opinion already referred to, of a passenger injured by the derailment of a train. As there shown, the mere fact or circumstance of the derailment, *i. e.*, the primary physical cause of the accident, is itself sufficient to make out a prima facie case of negligence on the part of the carrier toward the passenger; and this, of course, is true if it appears that the secondary physical cause was a broken wheel, no other circumstances appearing. Negligence, however, even toward a passenger, cannot, as a matter of substantive law, be predicated of the mere fact that the wheel was broken, unless there was or is assumed to have been some antecedent fault of omission or commission on the carrier's part. It is clear that the fact that the accident was caused by a broken wheel, of itself, has no tendency to establish negligence on the part of the carrier as the responsible human cause of the accident, except as the postulate,—which is independent of the particular case,—that trains are not ordinarily derailed from such a cause when due care is exercised by the carrier, is invoked. In other words, the inference of negligence from the mere fact of the derailment, or from that fact in connection with the fact that the wheel was broken, without more, is wholly the product of the syllogism of which the major premise is that trains are not ordinarily derailed except through the negligence of the carrier. But suppose, in addition to the circumstances of the derailment and the broken wheel, it appears that an inspection of the wheel after the accident disclosed a defect which must have existed for some time, and which was of such a nature that proper inspection would probably have disclosed it: There is now a circumstance in the case which in and of itself, and apart from the postulate referred to, has some tendency to show a fault of omission or commission on the part of the carrier as the responsible human cause of the very accident in question. In the Griffen Case, already referred to, the court thus indicates the distinction between the rule *res ipsa loquitur* as a distinctive rule and the rule with respect to circumstantial evidence: "When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of *res ipsa loquitur;* when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence." The vital distinction, however, seems to rest, not so much on the point whether the circumstances are immediately or more remotely connected with the occurrence, but rather upon the question whether, in and of themselves, and without the aid of the extrinsic postulate already referred to, they point merely to the physical causes of the occurrence, without having any tendency to indicate the responsible human agency, or, upon the other hand, have some tendency in and of themselves to indicate that there was some fault of omission or commission on the part of the defendant that contributed to the accident. If the former, it is necessary to invoke the distinctive rule *res ipsa loquitur*, which is applicable to the fact of negligence only, in order to make out a prima facie case of negligence; if the latter, the general principle, which is applicable to all matters of fact, that a fact may be established prima facie by circumstantial evidence, suffices.

If this distinction is well founded, it follows that the doctrine of the Federal cases which deny that the rule *res ipsa loquitur* ever applies as between master and servant does not prevent the making of a prima facie case of negligence in that class of actions by proof of circumstances which in and of themselves, and without the aid of the postulate that accidents of the kind in question do not ordinarily happen in the absence of negligence, have some tendency to indicate a fault of omission or commission on the defendant's part as the responsible human cause of the accident.

There is another distinction, which has already been incidentally alluded to, that is to be observed in estimating the effect of

the doctrine of the Federal cases. The distinction is that which exists between cases in which the effort is to infer—and in which, if the plaintiff is to succeed, the jury must infer—some antecedent fault of omission or commission on the part of the master, and those cases in which the question is whether the very existence of the physical conditions which caused the accident, irrespective of any antecedent omission or commission, constitutes negligence. The rule *res ipsa loquitur*, when understood in the sense above explained, has no place in this class of cases, since the jury in such a case are not called upon to infer from the physical cause of the accident an antecedent fact, *e. g.*, the omission to make proper inspection, as the basis of a finding of negligence, but are merely to say whether or not the existence of the physical cause constituted negligence irrespective of the conditions which created it. The distinction between the two cases may, perhaps, be illustrated by supposing that in each the jury is to return a special verdict with distinct findings on every ultimate question of fact. In the former case, in order to sustain a general verdict for the plaintiff, it would be necessary for the special verdict to find as a fact some antecedent fault of omission or commission, in addition to the physical cause of the accident itself, as, for instance, that the defect which caused the accident had existed for a considerable time. In the latter case, however, a special verdict merely finding that the existence of the conditions which caused the accident, *e. g.*, the absence of a safeguard in connection with a place of work or appliance, constituted negligence, would be sufficient to sustain a general verdict for the plaintiff, so far as the element of defendant's negligence is concerned.

If this distinction is well founded, it follows that the doctrine of the Federal cases denying that the rule *res ipsa loquitur* ever applies between master and servant will not interfere with the submission to the jury, in a proper case, of the question whether the existence of the conditions which caused the accident in and of themselves constituted negligence, irrespective of any antecedent fault of omission or commission on the part of the master.

In the light of these distinctions, the doctrine of the Federal cases, even if it goes to the full extent of denying that the rule *res ipsa loquitur* as a distinctive rule ever applies between master and servant, has considerably less practical effect than, upon a first impression, might appear. It is true, nevertheless, that, if this doctrine is sound, it will not infrequently operate to prevent the establishment of a prima facie case of negligence in actions by a servant against the master by proof of circumstances that would be sufficient for that purpose if the rule *res ipsa loquitur* could be invoked.

Turning now to the merits of the doctrine supported by the Federal cases: The rule *res ipsa loquitur* is not dependent upon the existence of a contractual relation between the person injured and the person sought to be held responsible for the injury. Thus, for example, the rule was applied in Howser v. Cumberland & P. R. Co. 80 Md. 146, 27 L.R.A. 154, 45 Am. St. Rep. 332, 30 Atl. 906, to a person not an employee, walking over a footpath running beside a roadbed, but not upon the right of way, who was injured by the falling of crossties from a passing car. So, in Dixon v. Plums, 98 Cal. 384, 20 L.R.A. 698, 35 Am. St. Rep. 180, 31 Atl. 931, 33 Atl. 268, it was held that a presumption of negligence arises where a chisel drops from a scaffold on which a workman is engaged with tools, and injures a person walking upon a sidewalk, where he has a right to travel, and where people are constantly traveling. Other illustrations of this kind might be cited. The rule, however, has its most frequent application in cases between carriers and passengers in which, as in cases between masters and servants, a contractual relation is involved. It is obvious at once that, even conceding, for the purposes of discussion, that the rule ever applies between master and servant, it has a much more restricted application in that class of cases than in actions between carriers and passengers, for the reason that the circumstances which call the rule into operation must not only support the inference of negligence on the part of the defendant, but must also reasonably repel every other inference. Allen v. Kingston Coal Co. 212 Pa. 54, 61 Atl. 572. That in this respect a passenger occupies a much more favorable position than an employee may be illustrated by again invoking the hypothetical case of the derailment of a train, assuming now that both a passenger and a train employee are injured. As already stated, the bare fact of the derail-

ment would be sufficient to make the rule applicable in favor of the passenger, there being no other circumstances in the case to repel the inference of the defendant's negligence; but it is apparent that, even conceding that the rule ever applies as between master and servant, the latter, at least unless the fellow-servant rule has been modified, is in a much less favorable position than the passenger as regards the rule; for, even apart from the difference in the degrees of duty owing to a passenger and to an employee, the inference, from the bare fact of the derailment, that it was due to negligence for which the company is responsible to an employee, is perhaps no more, or little more, reasonable or natural than that it was due to the negligence of a fellow servant for which the master is not responsible. The appearance of the additional circumstance that the derailment was caused by a broken wheel would put the employee and the passenger more nearly on a par as regards the rule, since the duty with respect to appliances of that kind cannot ordinarily be delegated to fellow servants so as to relieve the master from liability. It is true, as a matter of substantive law, that the master is not an insurer of the safety of appliances, and that, in order to render him liable to a servant in consequence of a defect, he (the master) must have known of the defect, or have been ignorant thereof in consequence of his own negligence. As this, however, is also true with respect to the duty of a carrier toward a passenger, although slighter negligence will suffice in his case, it is obvious that it is not necessarily a sufficient reason for refusing to apply the rule in favor of a servant. Even assuming, however, that the physical cause of the accident was such as to exclude the application of the fellow-servant rule, or that that rule has been abrogated by statute, there are still many other difficulties arising from the doctrine of assumption of risk, and other doctrines peculiar to the relation of master and servant, that may prevent the operation of the rule *res ipsa loquitur*, or at least prevent its effective operation, in favor of the employee, under circumstances that would concededly make it operative in favor of a passenger. Again, even if it be assumed that the physical cause of the accident was such as reasonably to repel any inference which, under the peculiar doctrines applicable between master and servant, would relieve the former from responsibility, the employee is still, generally speaking, in a much less favorable position than the passenger, for the reason that there is obviously much greater probability, in the case of the employee than in the case of a passenger, that the physical cause of the accident will not repel, or that the other circumstances will support, an inference that the accident was not due to any neglect of the defendant, or that it was due to the negligence of the plaintiff himself.

It will be observed that the considerations just discussed merely tend to assign to the rule *res ipsa loquitur* a narrower scope as between master and servant than as between carrier and passenger, and not entirely to deny its applicability to the former class of cases. In one possible view, which has some support from the cases, of the principle by virtue of which negligence may be inferred from the happening of an accident in connection with its physical cause in carrier and passenger cases, there is a ground for the application of the principle to that class of cases that does not exist in any case between master and servant, though this view would not necessarily exclude the application of the rule *res ipsa loquitur* in all cases of the latter class. According to this view, the principle referred to would seem to be distinguishable from, or at least to present quite a distinctive aspect of, the rule *res ipsa loquitur*. It appears to rest upon the theory that the peculiar relation of trust and confidence between the carrier and passenger, arising out of the contract by which the latter confides the safety of his person to the former, is deemed to furnish in itself a reason for the indulgence of a presumption of negligence in case of an accident, irrespective of, or at least in addition to, the inherent probability that the particular accident in question was due to the negligence of the carrier. Thus viewed, the principle seems to operate as a means of partially compensating the passenger for the relaxation of the former strict substantive rule which made the carrier the absolute insurer of the passenger's safety, by substituting for that substantive rule a rule of evidence which calls upon the carrier in the first instance to exonerate itself by negativing negligence. Some apparent support for this view is furnished by the statement in Thomas on Negli-

gence, § 574, quoted with approval in Benedick v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, to the effect that the doctrine *res ipsa loquitur* applies to two classes of cases only, namely: (1) "When the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; (2) where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of persons or property, and is so tortious in its quality, as, in the first instance at least, to permit no inference save that of negligence on the part of the person in the control of the injurious agency." This view also has some apparent support from cases which permit the inference of negligence on the part of the carrier to be drawn from the bare fact of a collision between its trains and a vehicle not under its control, although that fact alone would seem to create no greater probability that the accident was due to negligence for which the carrier would be responsible to its passengers, than to the negligence of the person in charge of the other vehicle for whose negligence the carrier would not be responsible. (See, for example, Clark v. Chicago & A. R. Co. 127 Mo. 197, 29 S. W. 1013.) Upon the other hand, this view of the principle, which, to some extent at least, makes the presumption or inference of negligence from the circumstances independent of the inherent probability that the particular accident was due to the negligence of the carrier, is inconsistent with the general trend of authorities which limit the principle to cases where the accident is caused by the breaking down of the carrier's vehicle, roadway, or other appliances of transportation, or by an error of the carrier or its passengers in operating them (see 2 Fetter, Carr. Pass. § 480), and which denies the applicability of the principle in other cases, as, for instance, where a passenger is struck by a missile coming through a window (see Thomas v. Philadelphia & R R. Co. 148 Pa. 180, 15 L.R.A. 416, 23 Atl 989). Moreover, most of the cases which discuss the principle as between carrier and passenger seem to assume that it is a mere specific application of the rule *res ipsa loquitur*, and that it rests upon the inherent probability that the accident was due to a breach of duty which the defendant owed to the passenger.

Assuming that the latter is the true view, there still remains a substantial reason for distinguishing the entire class of master and servant cases from the carrier and passenger cases so far as the rule *res ipsa loquitur* is concerned. This reason springs from the difference in the degrees of duty owed to a passenger and to an employee respectively. Although the entire theory of a difference in degrees of duty has of late been frequently questioned, the cases nevertheless very generally distinguish between the degree of duty owed by a carrier to a passenger and that owed by a master to a servant, holding that in the former case the duty is to exercise a very high degree of care, or the care that a very prudent man would exercise under the circumstances, —some cases even state that it is the carrier's duty to use extraordinary diligence (see Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979),—and that in the latter case the duty is only to exercise ordinary care, or the care which an ordinarily prudent man would exercise under the circumstances. This difference in the degrees of duty furnishes a substantial reason for applying the rule as between carrier and passengers which does not exist as between master and servant, since it is obviously safer and more in accord with the probabilities to infer a breach of a high degree of duty, which is the complement of slight negligence, than the breach of a lower degree of duty, which is the complement of ordinary negligence. The reason for the distinction gains additional force if the carrier's duty to a passenger is to use extraordinary diligence.

Coming, now, to the question, how this matter stands upon authority: It is obviously impossible in this article even to summarize the cases in point. Many of the cases are cited in a case note to Fitzgerald v. Southern R. Co. 6 L.R.A.(N.S.) —. As there shown, a number of cases decided in the state courts have expressly followed the doctrine of the Federal courts, and apparently denied that the rule *res ipsa loquitur* ever applies between master and servant. Others, while less sweeping in their language on the point have yet denied a presumption or inference of negligence from the accident, in connection with its physical cause, under circumstances which would seem to make a proper case for the operation of the rule, if it ever applies between

master and servant. Others which have also denied the inference or presumption are, upon their facts at least, explainable for the reason that the physical cause of the accident was not such as reasonably to repel the inference that the accident was due to the negligence of a fellow servant, or that the risk was assumed, or that the accident was due to the negligence of the servant injured. So, of course, many cases which have denied the inference or presumption may be explained upon the ground that all the circumstances, when taken together, repelled or rebutted any presumption of negligence on the part of the master that might otherwise have arisen from the occurrence of the accident in connection with its physical cause.

Some of the strongest cases in support of the doctrine that the rule *res ipsa loquitur* does apply, in proper cases, even as between master and servant, have already been referred to. There are other cases which expressly adopt the same doctrine, and still others which seem impliedly to adopt it since they appear to have permitted an inference or presumption of negligence to be drawn from the accident in connection with its physical cause or causes alone. It is to be noted in this connection, however, that it is often extremely difficult, and sometimes impossible, to determine with certainty from the report of a case whether the inference of negligence rested solely upon the physical cause of the accident or in part upon circumstances tending of their own force to show negligence in the particular instance. For the reasons already explained, if there are circumstances of the latter kind, the decision permitting the presumption or inference is of little weight as a precedent upon the question under discussion. There are other cases permitting an inference of negligence to be drawn from the circumstances which it is clear, for the reason just stated, cannot be regarded as authority upon the point, since the inference did not rest wholly upon the accident and its physical cause, but was aided by additional circumstances having some tendency in and of themselves to prove negligence.

While it is clearly impossible to reconcile, or even properly to contrast, all the cases in point; and while, as already shown, there are substantial reasons, as well as express authority, in support of the doctrine which denies that the rule *res ipsa loquitur*, in its distinctive sense of a rule permitting negligence to be inferred from the accident in connection with its physical cause or causes, ever applies between master and servant,—it is believed that the doctrine which has the best support in reason, and which appears to be in accord with the trend of the later decisions, excluding possibly the Federal cases, is that indicated in the first and second syllabi, by the court, in the case of Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329, as follows: "(1) The maxim, *Res ipsa loquitur*, is applicable under certain circumstances in suits by a servant against his master for damages resulting from the master's negligence. (2) The maxim is however rarely applicable in such cases, and only where the manner of the occurrence producing the injury, or the attendant circumstances, are such that the jury may reasonably infer that the occurrence could not have taken place unless the master was lacking in diligence as to instrumentalities, place of work, or fellow servants."

This statement of the doctrine, while carefully preserving the distinction, in favor of the passenger as against the employee, arising out of the difference in their contractual relations with the defendant, in effect repudiates the view that the peculiar relation existing between the carrier and passenger is in every case a necessary condition of the application of the rule, and is thus in accord with the authorities which have applied the rule, even when there was no contractual relation at all between the parties. Many of the cases decided in the state courts which are apparently opposed to this view may be reconciled with it by referring them to the qualification expressed in the second syllabus; and this seems to be true of some of the Federal cases even. See Northern P. R. Co. v. Dixon, 139 Fed. 737, and dissenting opinion of Sanborn, J., in Westland v. Gold Coin Mines Co. 41 C. C. A. 193, 101 Fed. 59.

It will be observed that the alternative conditions, enumerated by the court in the case last referred to, which must be reasonably repelled by the circumstances in order to make the rule *res ipsa loquitur* applicable between master and servant, include only those which are peculiar to that relation, and which therefore serve to distinguish that class of cases from cases between carriers and passengers. There are, of course, other conditions which may prevent

the operation of the rule, or at least its successful operation in favor of a servant; for example, the failure of the circumstances reasonably to repel the inference, or their tendency when considered together to support the inference, that the accident was due solely to the negligence of the person injured. As the rule, even when it applies, merely operates to establish prima facie the single element of the defendant's negligence, it is not, strictly speaking, a condition of its applicability that the physical cause or causes of the accident shall reasonably repel the inference that the servant assumed the risk, or that he contributed to his injury by his own negligence. It is obvious, however, that any beneficial result to the servant from the application of the rule may be prevented by other circumstances tending to show either one of those conditions.

It may be remarked in this connection that the abolition or modification by statute of the fellow-servant rule will serve considerably to extend the operation of the rule *res ipsa loquitur* as between master and servant, assuming that it is ever proper to apply it in that class of cases, since upon that assumption the fellow-servant rule is the most prolific source of possibilities or probabilities tending to repel the inference that the responsible human cause of the accident was negligence for which the master is responsible.

In view of the decided difference of opinion among the authorities upon the question whether the rule *res ipsa loquitur* ever applies between master and servant, it is nearly, if not quite, as important to confine within its proper limits the doctrine which denies the applicability of the rule to that class of cases, as to determine whether or not the doctrine is a sound one. To repeat what has already been said in substance: The doctrine only prevents the indulgence of a presumption or inference of negligence on the part of the master from the accident in connection with its physical cause or causes alone; and does not prevent such presumption or inference from circumstances, in addition to the physical cause of the accident, which tend of themselves, and apart from the postulate that accidents of the kind do not ordinarily happen in the absence of negligence, to indicate some fault of omission or commission on the part of the master as the responsible human cause of the accident; nor does it prevent the submission to the jury in a proper case of the question whether the very existence of the physical cause of the accident constitutes negligence, irrespective of any antecedent omission or commission on the master's part. It may, perhaps, be said that to assign so restricted a scope to the rule *res ipsa loquitur* is practically to deny it any effect whatever, because it will rarely or never happen that the circumstances attending an accident will disclose nothing but its physical cause or causes. That objection, however, fails to take account of the fact that, while there are generally other attendant circumstances that might have been disclosed, it frequently happens that the plaintiff's evidence upon which he seeks to go to the jury on the question of the defendant's negligence does disclose only those circumstances which indicate the physical cause or causes of the accident, and none which of themselves, and apart from the postulate that accidents of the kind in question do not ordinarily happen in the absence of negligence, have any tendency to indicate a fault of omission or commission on the part of the defendant as the responsible human cause of the very accident in question. It is this condition of the evidence, and only this condition, which creates the occasion and necessity for the distinctive rule *res ipsa loquitur*, as distinguished from the general principle that facts in issue, negligence, or otherwise, may be established prima facie by circumstantial evidence, the latter principle being confined to circumstances which of their own force have some tendency to establish the fact in issue.

American Bar Association.

The executive committee, at its meeting in New York on December 28th, determined to hold the annual meeting of the American Bar Association at Portland, Maine, on Monday, Tuesday, and Wednesday, August 26, 27, and 28, 1907. The reason for selecting Monday, Tuesday, and Wednesday is that the International Law Association is considering holding its meeting in America this year, and the suggestion has been made to that body to hold its meeting in Portland on the last three days of said week.

Index to New Notes
IN
LAWYERS REPORTS ANNOTATED
5 L.R.A.(N.S.) pages 369—768.

Among the New Decisions.

Abstracts. See RECORDS.

Action. A cause of action for negligently constructing and maintaining the wall of a reservoir, so that it gives way and injures adjoining property, is held, in Mast v. Sapp (N. C.) 5 L.R.A.(N.S.) 379, to arise when the injury is done.

See also CONFLICT OF LAWS; ELECTION OF REMEDIES.

Assignment. An assignment of wages to be earned in the future under an existing employment is held, in Rodijkeit v. Andrews (Ohio) 5 L.R.A.(N.S.) 564, to be valid.

Attorneys. See CONTRACTS.

Automobiles. See MASTER AND SERVANT.

Bail. A recognizance given in a criminal proceeding, conditioned for the appearance of the accused before a circuit court on the first day of a certain term thereof, and that he will not depart thence without leave of the court, is held, in State v. Dorr (W. Va.) 5 L.R.A.(N.S.) 402, to be forfeitable only upon calling the accused upon the recognizance at some time during the term, and, if he fails to appear, by entering his default of record.

Bankruptcy. See PARTNERSHIP.

Banks. A bank which takes over the assets of a liquidating bank upon an agreement that it will pay its debts and a certain sum to each shareholder is held, in Ex parte Savings Bank (S. C.) 5 L.R.A.(N.S.) 520, to assume towards creditors the trust relation held by the transferrer, and the creditors of the latter are held to have a prior lien on the assets so transferred in case the transferee becomes insolvent before completing its undertaking.

Bills and notes. The mere exhibition by an agent for the investment of money, to his principal, of a negotiable note indorsed in blank as representing his money, and the acquiescence by the latter, are held, in Bettanier v. Smith (Iowa) 5 L.R.A.(N.S.) 628, not to constitute him the bona fide purchaser, so as to entitle him to hold the note as against the true owner, who had placed it with the agent for safe-keeping.

Bonds. See PRINCIPAL AND SURETY.

Carriers. A driver traveling on a stock pass is held, in Lake Shore & M. S. R. Co. v. Teeters (Ind.) 5 L.R.A.(N.S.) 425, to be a passenger for hire, within the rule forbidding the carrier to contract for an exemption from liability for its negligence.

A railroad company is held, in Davis v. Chesapeake & O. R. Co. (Ky.) 5 L.R.A. (N.S.) 458, not to lose its character of

common carrier by a special contract to transport over its road the messengers and packages of a particular express company, although it could not have been compelled to undertake such transportation.

See also MUNICIPAL CORPORATIONS.

Charities. Money which is transferred to trustees of a permanent fund derived from gifts and bequests, and which is under the exclusive control of such trustees, to be used for paying death benefits and giving charitable assistance to members of a mutual benefit society, membership in which all connected with a certain business are entitled to obtain, is held, in Minns v. Billings (Mass.) 5 L.R.A.(N.S.) 686, to be devoted to purposes of public charity, although the benefit is limited to the members of the association.

An instrument of writing purporting to convey lands to trustees and their successors in perpetual trust to provide a home and school for the maintenance and education of the children of the deceased members of a secret society is held, in Troutman v. De Boissiere Odd Fellows' Orphans' Home (Kan.) 5 L.R.A.(N.S.) 692, not to be a gift for purposes of a public charity, and to be void as against the rule prohibiting perpetuities of title in estates.

Commerce. A shipment by express, without order, by a dealer in one state to one whose name he has learned in another, with directions to the express company to collect the price before delivery, is held, in Adams Express Co. v. Com. (Ky.) 5 L.R.A.(N.S.) 630, not to constitute interstate commerce.

Conflict of laws. Breach of a contract promptly to deliver a telegram to a person in another state is held, in Western U. Teleg. Co. v. Lacer (Ky.) 5 L.R.A.(N.S.) 751, to take place at the place where the sendee was, and not at the place where the mistake in changing the address occurred, in the state where the contract was entered into, so that the courts of the former state, in which the action is brought, will apply its own rule as to damages for mental anguish, and not that of the state where the contract was made.

That an action for personal injuries to a nonresident in the state of his residence may, upon his death, be revived in favor of an administrator appointed for that purpose, is held, in Pyne v. Pittsburg, C. C. & St. L. R. Co. (Ky.) 5 L.R.A.(N.S.) 756, where the local statute provides that such action shall not die with the person, although by the law of his residence it would have done so.

Contracts. Words written on the back of a contract blank as a portion of the instrument to be signed by the parties are held, in Bonewell v. Jacobson (Iowa) 5 L.R.A.(N.S.) 436, to become part of the obligation, although the signatures are not below them, but on the preceding page.

A contract by a client not to settle a suit without the consent of the attorney being against public policy, a complaint seeking to enjoin a breach of such agreement is held, in Jackson v. Stearns (Or.) 5 L.R.A.(N.S.) 390, not to state a cause of action.

A release of one's obligation upon a contract to purchase real estate, which he claims to be void because made on Sunday, is held, in Brown v. Jennett (Iowa) 5 L.R.A.(N.S.) 725, to be a sufficient consideration for his promise to pay the broker's commission.

Corpse. The liability of doctors for performing an unauthorized autopsy on a dead body for the purpose of complying with a rule of the board of health and securing a burial permit is denied in Meyers v. Duddenhauser (Ky.) 5 L.R.A.(N.S.) 727.

Criminal law. The setting aside, upon motion of accused, of a verdict finding him guilty of manslaughter upon an indictment for murder, is held, in State v. Gillis (S. C.) 5 L.R.A.(N.S.) 571, to open the case for trial on the original indictment for the higher offense, since he is held thereby to waive the constitutional protection against second jeopardy.

Damages. See CONFLICT OF LAWS.

Divorce. The possession of a loathsome disease by a man is held, in Hooe v. Hooe (Ky.) 5 L.R.A.(N.S.) 729, not to be condoned by cohabitation with him by his wife, with knowledge of the fact, so as to bar a suit for divorce.

Easement. See VIEW.

Election of remedies. Enforcement, by action, of benefits due under a contract by which property is conveyed in consideration of support, is held, in Gall v. Gall (Wis.) 5 L.R.A.(N.S.) 603, not to preclude, on the theory of election of remedies, an action to rescind the contract for subsequent breaches.

Electricity. See EMINENT DOMAIN; MUNICIPAL CORPORATIONS.

Eminent domain. The constitutional right

of a railroad company to intersect, connect with, or cross any other railroad is held, in Kansas City, S. & G. R. Co. v. Louisiana Western R. Co. (La.) 5 L.R.A.(N.S.) 512, not to be confined to main tracks, but to extend to spur and other tracks forming a part of the same system.

The generation of electricity by water power, for distribution and sale to the general public on equal terms subject to governmental control, is held, in Minnesota Canal & Power Co. v. Koochiching Co. (Minn.) 5 L.R.A.(N.S.) 638, to be a public enterprise, for which the power of eminent domain may be exercised.

The selling of electric power to the public generally is held, in State ex rel. Harris v. Superior Court (Wash.) 5 L.R.A.(N.S.) 672, not to be a public use for which the power of eminent domain may be exercised.

Estoppel. One who withholds from record an assignment of a mortgage on property owned by a dealer in real estate is held, in Marling v. Milwaukee Realty Co. (Wis.) 5 L.R.A.(N.S.) 412, to be estopped from asserting her rights as against one who purchases the property on the faith of a release by the record mortgagee, although the statute makes an unrecorded instrument void as against instruments first recorded, and the assignment of the mortgage is actually recorded before the purchaser's deed.

Exemptions. Money which has reached the beneficiary is held, in Recor v. Recor (Mich.) 5 L.R.A.(N.S.) 472, not to be exempted from legal process by a statute providing that the benefit to be paid by any benefit society shall not be liable to attachment by trustee, garnishee, or other process, and shall not be seized by legal or equitable process or any operation of law, to pay any debt or liability of a certificate holder, or of a beneficiary named in the certificate.

Forgery. A notary public who makes a certificate of acknowledgment the contents of which are untrue is held, in Territory v. Gutierrez (N. M.) 5 L.R.A.(N.S.) 375, not to be indictable for forgery under a statute making it unlawful falsely to make, alter, forge, or counterfeit any public record, or any certificate, return, or attestation which may be received as legal proof.

Former jeopardy. See CRIMINAL LAW.

Fraudulent conveyances. Sale of property in a bona fide original transaction of bargain and sale at a price known by both vendor and vendee to be below its true value is held, in Rosenheimer v. Krenn (Wis.) 5 L.R.A.(N.S.) 395, not to be sufficient to charge the purchaser, as trustee, for the difference between price and value, in favor of creditors of the vendor.

Guardian and ward. The liability of a guardian for funds of the ward, turned over to her attorney for investment and lost through his dishonesty, is sustained in Abrams v. United States Fidelity & G. Co. (Wis.) 5 L.R.A.(N.S.) 575.

Health. The members of a board of health are held, in Rohn v. Osmun (Mich.) 5 L.R.A.(N.S.) 635, not to be liable for injuries caused by their failure to comply with a provision of the statute for the protection of the community against persons afflicted with contagious disease, and the quarantine of such persons, that "they shall provide nurses," since such matter is discretionary.

Highways. See VIEW.

Homicide. See CRIMINAL LAW.

Husband and wife. The right of a wife to enforce a promissory note executed to her by her husband is sustained in Mathewson v. Mathewson (Conn.) 5 L.R.A.(N.S.) 611, under a statute replacing unity of property rights with equality in legal identity and in ownership of property.

See also DIVORCE; MARRIAGE.

Injunction. The right to an injunction to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se*, is sustained in Bangs v. Dworak (Neb.) 5 L.R.A.(N.S.) 493, where the persons seeking such injunction show that the erection of the buildings will work special or irreparable injury to them and their property.

See also VIEW.

Insurance. A present contract of insurance is held, in Whitman v. Milwaukee F. Ins. Co. (Wis.) 5 L.R.A.(N.S.) 407, not to be effected by signing an application, followed by the statement of the agent that he would "see to it, take care of it, so it would be all right," would "get a policy."

An injury received by making an intentional assault on another by striking him in the face with the fist is held, in Fidelity & C. Co. v. Carroll (C. C. A. 4th C.) 5 L.R.A.(N.S.) 657, not to be by accidental means, within the meaning of a policy insuring

against injuries received through such means.

The issuance of a policy of life insurance for $5,000, upon an application for $10.000 is held, in New York L. Ins. Co. v. Levy (Ky.) 5 L.R.A.(N.S.) 739, to be a rejection of the proposition of the applicant, and not binding upon the insurer until assented to by the applicant.

An incontestable clause in an insurance policy is held, in Bromley v. Washington L. Ins. Co. (Ky.) 5 L.R.A.(N.S.) 747, not to prevent the insurer from resisting payment on the ground that it was issued to one having no insurable interest, and is therefore void as against public policy.

Interest. See USURY.

Interstate commerce. See COMMERCE.

Intoxicating liquors. See MUNICIPAL CORPORATIONS.

Libel. An individual concern engaged in the trading-stamp business is held, in Watson v. Detroit Journal Co. (Mich.) 5 L.R.A. (N.S.) 480, to have no right to maintain an action for libel against one publishing an article not referring to all persons engaged in that business in the city, but referring generally to concerns engaged in the business.

License. An act requiring journeymen plumbers to secure a license as a condition to carrying on their trade is held, in State ex rel. Richey v. Smith (Wash.) 5 L.R.A. (N.S.) 674, not to be a valid health regulation.

See also MUNICIPAL CORPORATIONS.

Marriage. The right of a court annulling a marriage at the suit of a husband who was under the age of consent when the marriage was solemnized, to require him to pay a reasonable amount for the support and nurture of the issue of such marriage, is sustained in Willits v. Willits (Neb.) 5 L.R.A.(N.S.) 767.

Master and servant. A servant employed for an entire term at wages payable in instalments at stated intervals is held, in Smith v. Cashie & C. R. & L. Co. (N. C.) 5 L.R.A.(N.S.) 439, to be entitled, upon being wrongfully discharged, to treat the contract as existing, and sue at each period of payment for the salary then due.

The wilful default of the manager of a farm to submit accurate accounts to his employer, as required by his contract, is held, in Sipley v. Stickney (Mass.) 5 L.R.A. (N.S.) 469, to deprive him of his right to recover his stipulated wages, although it results in no injury to the employer.

Where a contract for service is an entire one, and not severable, and a servant is lawfully discharged for disobedience of the reasonable orders of the master, he is held, in Von Heyne v. Tompkins (Minn.) 5 L. R.A.(N.S.) 524, not to be entitled to recover for his services.

See also MUNICIPAL CORPORATIONS.

Municipal corporations. A municipal corporation, in maintaining and operating an electric-light plant under legislative authority, but with no duty imposed upon it to do so, is held, in Davoust v. Alameda (Cal.) 5 L.R.A.(N.S.) 536, to be exercising its private or proprietary rights, within the rule making it liable for the negligence of its servants.

A municipal corporation which has undertaken to exercise its charter power to maintain an electric-light plant to light its streets and sell electricity to private consumers is held, in Fisher v. New Bern (N. C.) 5 L.R.A.(N.S.) 542, to be responsible for the negligent acts of the commission which the legislature has placed in charge of the plant.

Municipal authorities empowered by the city charter to pass ordinances prohibiting the illegal sale of intoxicating liquors within the city limits are held, in Southern Express Co. v. R. M. Rose Co. (Ga.) 5 L.R.A.(N.S.) 619, to have no authority to require an express company delivering within the city liquors lawfully purchased outside of it to pay a specified annual license fee.

Negligence. That an unprotected vat of boiling water is maintained within 4 feet of a city sidewalk on unfenced premises is held, in Johnson v. Paducah Lumber Co. (Ky.) 5 L.R.A.(N.S.) 733, not to render the owner liable for injuries to one falling into it when attempting to cross the lot for purposes of his own.

Notary public. The right of a woman to hold the office of notary public is denied in Re Opinion of Justices (N.H.) 5 L.R.A. (N.S.) 415.

See also FORGERY.

Officers. A public officer who is a member of a corporate body upon which a duty rests is held, in Monnier v. Godbold (La.) 5 L.R.A.(N.S.) 463, not to be personally liable for the neglect of duty by that body.

See also HEALTH.

Partnership. A written agreement made by one who has acquired options upon certain lands, empowering another, in the absence of the optionee, to accept the options and make sales of the lands, and providing that all profit shall be distributed equally between them, is held, in Clark v. Emery (W. Va.) 5 L.R.A.(N.S.) 503, not to be a contract creating a partnership for the purchase and sale of lands.

The right of the court to require members of a partnership which has committed an act of bankruptcy to bring their property into the bankruptcy proceedings for administration is sustained in Dickas v. Barnes (C. C. A. 6th C.) 5 L.R.A.(N.S.) 654, although proceedings would not, under the statute, lie against them individually because they belong to an exempt class, or have committed no act of bankruptcy.

Payment into court. See TENDER.

Physicians and surgeons. The right of a state, under its police power, to prohibit physicians from soliciting patients by paid agents, is sustained in Thompson v. Van Lear (Ark.) 5 L.R.A.(N.S.) 588.

Plumbers. See LICENSE.

Principal and surety. Making payments before they are due under the terms of a building contract is held, in First Nat. Bank v. Fidelity & D. Co. (Ala.) 5 L.R.A. (N.S.) 418, to release a surety on the contractor's bond.

A provision for stay of execution in an agreement for judgment for overdue rent is held, in Bothfeld v. Gordon (Mass.) 5 L.R.A.(N.S.) 764, not to release the lessee's surety if the extension is not beyond the time in which, in the ordinary course of judicial proceedings, execution could have been obtained.

Process. See EXEMPTIONS.

Proximate cause. The collision of an express wagon with the hind wheel of a wagon being loaded from the sidewalk, forcing it against the horse, which was standing unhitched in the street, and causing the animal to run away, is held, in Collins v. West Jersey Express Co. (N. J. Err. & App.) 5 L.R.A.(N.S.) 373, to be the proximate cause of an injury to one who, to avoid the horse, jumped aside and broke his leg by falling over a board pile in the street.

Public money. See STREET SPRINKLING.

Railroads. See EMINENT DOMAIN.

Recognizance. See BAIL AND RECOGNIZANCE.

Records. The right of an abstract company to copy real-estate records for the purpose of compiling an independent set of abstract books is sustained in State ex rel. Nevada Title, G. & T. Co. v. Grimes (Nev.) 5 L.R.A.(N.S.) 545, under a statute providing that every recorded instrument of writing whereby any real estate may be affected shall impart notice to all persons of the contents thereof.

Release. A release obtained by the physician of one causing injury by negligence, from the injured person after he has taken charge of the case and gained the patient's confidence by his apparent friendship and solicitude for his welfare, is held, in Viallet v. Consolidated R. & P. Co. (Utah) 5 L.R.A. (N. S.) 663, to be properly set aside where the injured person relied on his statements and assurances as to the nature and probable duration of the injury, which were reckless and proved untrue, and had a tendency to deceive and mislead, and were made for the purpose of inducing the settlement.

False representations made by a surgeon of a railroad company as to the extent of the injuries of an employee are held, in Gulf, C. & S. F. R. Co. v. Huyett (Tex.) 5 L.R.A.(N.S.) 669, to be no reason for setting aside a release subsequently obtained by a claim agent, although the employee acted on the information so received in signing the release, if the claim agent did not knowingly take advantage of such fact.

Replevin. That one's property has been attached as that of a stranger is held, in Baltimore, C. & A. R. Co. v. H. Klaff & Co. (Md.) 5 L.R.A.(N.S.) 495, not to entitle him to maintain replevin to recover its possession.

Sale. The right of a purchaser, under a contract for the sale of machinery which stipulates that until the price is paid the title and ownership shall remain in the vendor, to maintain an action for breach of warranty of quality before such payment is made, is denied in Bunday v. Columbus Machine Co. (Mich.) 5 L.R.A.(N.S.) 475, on the ground that the title did not pass at the time of the installation.

Street sprinkling. Water for street sprinkling is held, in McAllen v. Hamblin (Iowa) 5 L.R.A.(N.S.) 434, to be for a pub-

lic purpose, within the meaning of a statute requiring municipal authorities to contract for a water supply for such purpose.

Taxes. Checks drawn by the United States Treasurer in payment of interest on government consols are held, in Hibernia Savings & L. Soc. v. San Francisco (Cal.) 5 L.R.A.(N.S.) 608, not to be exempt from state taxation, under a provision of the United States Revised Statutes exempting "all stocks, bonds, Treasury notes, and other obligations" of the United States.

Telegraphs. See CONFLICT OF LAWS.

Tender. The payment into court of an amount tendered upon a matured debt is held, in Mann v. Sprout (N. Y.) 5 L.R.A. (N.S.) 561, to transfer the title to the creditor, although he does not signify his acceptance, and the right of the debtor to withdraw the money afterwards, even with the consent of the court, is denied.

Usury. The taking of interest for a portion of the year, computed on the principle that a year consists of three hundred and sixty days, or twelve months of thirty days each, is held, in Patton v. Bank of La Fayette (Ga.) 5 L.R.A. (N.S.) 592, not to be usurious provided this principle is resorted to in good faith as furnishing an easy and practical mode of computation, and not as a cover for usury.

View. The easement of view from every part of a public street is held, in Bischof v. Merchants' Nat. Bank (Neb.) 5 L.R.A.(N. S.) 486, to belong as a valuable right to one owning property abutting on the street.

Wages. See ASSIGNMENT.

Waiver. See CRIMINAL LAW; INSURANCE.

Women. See NOTARY PUBLIC.

New Books.

"Frailties of the Jury." By Henry S. Wilcox. Legal Literature Company, Chicago, Ill. 1907. 1 Vol. $1.50.

This is a companion to "Foibles of the Bar" and "Foibles of the Bench." Those who have read the former volumes will readily understand what this one is as a parallel to them. It brings out not only many frailties of jurors, but also the resulting perversions of justice which they cause.

"History of Roman Private Law." Part. I. Sources. By E. C. Clark, LL.D. Cambridge University Press. 1906. 1 Vol. $1.50.

This, by the Regius Professor of Civil Law in the University of Cambridge, is, as the title indicates, a study of the sources of the history of the subject. It is very concise and compact, and must be of great value to those who are interested in Roman law.

"The Federal Power over Carriers and Corporations." By E. Parmalee Prentice. MacMillan Company, New York. 1907. 1 Vol. $1.50.

The fundamental proposition of this treatise is a denial of the power of Congress to interfere with the freedom of intercourse and trade under the guise of regulating commerce. Incidentally it denies the power of Congress to charter mercantile companies for interstate commerce. The questions of the extent of Federal power in this particular are at this moment of extraordinary and far-reaching importance, and it is certainly well that the arguments against the continued expansion of this Federal power should be presented with clearness, as is done in this volume.

Bishop on "Contracts." By Joel P. Bishop. 2d ed. by Marion C. Early. Buckram, $6.30 delivered.

"Local Improvements in Illinois." By Tom W. Smurr. Buckram, $3.50 delivered.

"Law of Evidence under the Statutes of Illinois." By J. E. Whitehead. Buckram, $4.25 delivered.

"Illinois Circuit Court Reports." Vol. 1, $3.50 per vol.

"Encyclopædic Digest of Tennessee Reports." Under supervision of T. J. Michie. in 12 Vols. Vol. 1. Sheep, $7.50.

Sharp & Alleman Co.'s "Lawyers' and Bankers' Directory for 1907." $5.

"Cases on Equity Jurisdiction." By J. Brown Scott. 2 Vols. Vol. 2. Buckram, $4.50.

"Digest of Important Cases on the Law of Crimes." By J. R. Rood. Buckram, $3.75 net.

"Practice in Civil and Criminal Cases before Subordinate Courts of Pennsylvania." By Hess & Valentine. Buckram, $7.50.

"Questions and Answers on Evidence." By Wilber A. Owen. Paper, 50 cts.

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Bradbury's "Lansing's Forms and Practice of Civil Procedure, Including Ordinary Pleading." Entirely rewritten and rearranged. 4 vols. Buckram, $24.

"The Arkansas Justice." By Duffie & Hill. Revised by R. D. Campbell and J. H. Stevenson. Buckram, $6.

"American State Reports." Vol. 110. $4.

Bender's "National Lawyers' Diary, 1907, and Directory for New York." $2.

"Practice of the Supreme Court of Canada." By E. R. Cameron. $9.

"Law of Torts." By Thomas M. Cooley. 3d ed., by John Lewis. 2 vols. $12.

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McMaster's "Commercial Cases." October, 1905, to October, 1906. $6.

"New York Lawyers' Diary, 1907." $1.50.

"Local and Central Government." By Percy Ashley. A comparative study of England, France, Prussia, and the United States. Cloth, $3.

Mason & Hoguet's "Supplement to Brightley's New York Digest." 2 vols. Buckram, $15. Vol. 1 now ready.

"Index-Digest Interstate Commerce Law." By O. P. Anderson. $5.

"The American Lawyer: As He was—As He is—As He can be." By John R. Dos Passos. Buckram, $1.75.

"The Law of Fraud." By John W. Smith. Buckram, $6.

"Massachusetts Bar Questions and Answers." 1898–1906. $3.50.

Ballard's "Law of Real Property." Vol. 11, and new Index of the set. $6.50.

"Iowa Reports." Vol. 130. $3.

"Preparation and Contest of Wills." By Daniel S. Remsen. Buckram, $6.35 delivered.

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"Alaska Reports." Vol. 2. $10.

"Index-Digest of Interstate Commerce Acts." By Charles S. Hamlin. Buckram, $3.50 .

"McCall's Clerk's Assistant." 6th ed., by H. B. Bradbury. Buckram, $6.

Recent Articles in Law Journals and Reviews.

"When is an Action Begun so as to Stop the Running of the Statute of Limitations?"—12 Virginia Law Register, 675.

"Liability for Acts of Public Servants."—23 Law Quarterly Review, 12.

"Evidence to Show Intent."—23 Law Quarterly Review, 28.

"The 'Mortgage Charge' of the Land Transfer Acts."—23 Law Quarterly Review, 68.

"Privileged Communications between Attorney and Client."—64 Central Law Journal, 66.

"The Modern Conception of Animus."—19 Green Bag, 12.

"The Segregation of Japanese Students by the School Authorities of San Francisco."—19 Green Bag, 38.

"The Limitation of Liability of Vessel Owners."—16 Yale Law Journal, 84.

"The Abuse of the Corporation Charter."—64 Central Law Journal, 49.

"Invalidity of Interstate Railway Transportation Contracts of Common Carriers."—64 Central Law Journal, 29.

"Latent Equities."—68 Albany Law Journal, 290.

"Proposed Uniform Statute Regulating Annulment of Marriages, and Divorce."—68 Albany Law Journal, 297.

"Capital and Capital Stock."—16 Yale Law Journal, 161.

"Titles to Coal Land in Pennsylvania and Incidental Monopolies Connected Therewith."—16 Yale Law Journal, 167.

"The Profession in the Political History of the United States."—16 Yale Law Journal, 182.

"Lawyers and Corporate Capitalization."—5 Canadian Law Review, 450.

"Relation between the General Government and the States."—10 Law Notes, 186.

"Rescission of Executed Contracts of Sale for Breach of Warranty."—10 Law Notes, 188.

"Reforms in the Law of Future Interests Needed in Illinois, Part II."—1 Illinois Law Review, 374.

"The Privilege of Silence and Immunity Statutes."—64 Central Law Journal, 3.

"The Law of Bank Checks (Practical Series)."—23 Banking Law Journal, 951.

"The Payment of Overdue Notes Payable at Bank."—23 Banking Law Journal, 960.

The Humorous Side.

HIS LETTER HEAD.—The following is sent us as an Indiana lawyer's letter head, which our correspondent thinks is about the "limit."

"LAW OFFICES OF

Photo	General Practice, Ex-Prosecutor Mercantile Law, Adjustments, Notary Public. P.G.M., I.O.O.F. D.G.C., K. of P. G.S., S. of L."
Attorney.	

AN OFFICIAL SEAL.—A Texas notary, to whom a man and wife were sent for the acknowledgment of a deed, made the following certificate: "to however it may concern this is to satifice that Mr. and Mrs. Green are relible people as far as I know of them have always found them to be stright & honest.

"(Signed) S—— G——."

He then crumpled up the deed so as to get it into a small envelope and wrote on the envelope for his official seal. "Sealed by my hand S—— G——."

A LONG LOOK AHEAD.—A Vermont justice of the peace, in deciding an important ejectment suit, recently rendered the following judgment: "That the plaintiff have possession of the premises, and may recover rent up to the day of judgment."

WANTED, A LAW BOOK.—A Vermont lawyer writes that a congressman who formerly practised law went, soon after he was admitted to the bar, into the office of an older attorney, and said: "Mr. ——, may I borrow one of your law books?" The older attorney looked over his glasses and said: "Why, certainly. Does it make any difference which one?"

THE CASE WAS SAFE.—Another Vermont anecdote is as follows: A state's attorney was called into a small town to prosecute a popular hotel keeper for violating the liquor laws, and, when a jury was called for by the defendant and was being impaneled, he concluded that with such a jury as that it would be best not to proceed in that court. So he moved that he be allowed to enter a *nolle pros.* While the court was thinking just what he should do with the motion, one of the jurymen broke out, saying: "Your Honor, let 'em have their *noller prosser*, we'll beat 'em anyhow."

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